BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONNA M. GARONE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,025,067
WENDY'S	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the May 19, 2006, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

This is a claim for an August 8, 2005, accident and resulting low back injury. In the May 19, 2006, preliminary hearing Order, Judge Klein granted claimant's request for workers compensation benefits after finding claimant's accident arose out of and in the course of her employment with respondent.

Respondent and its insurance carrier contend Judge Klein erred. They argue claimant injured her back at home and, therefore, her low back injury did not arise out of and in the course of her employment. They also argue Dr. Pat D. Do's opinion that claimant's low back injury occurred at work has very little weight as the doctor allegedly did not have a complete or accurate history. Accordingly, respondent and its insurance carrier request the Board to deny claimant's request for benefits.

Conversely, claimant contends the Order should be affirmed. Claimant argues the Judge found her testimony credible and that Dr. Do's opinion regarding the cause of her injury is uncontradicted.

The only issue before the Board on this appeal is whether claimant injured her back in an accident that arose out of and in the course of her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes the preliminary hearing Order should be affirmed.

This is the second time this claim has come before the Board. Accordingly, a detailed summary of the facts is not necessary. In short, on Monday, August 8, 2005, claimant opened the store where she worked for respondent as one of its managers. After working an eight-hour shift, which included lifting heavy items, that evening claimant noticed a dull pain in her low back.

Claimant was not scheduled to work the next day and that morning she awoke with some back pain. She then went into the bathroom and her back locked. The following day, August 10, 2005, claimant worked with back pain but she required help lifting meat from the freezer. On Thursday, claimant made an appointment with her physician for the next day. Claimant went to her doctor's office on Friday and on Monday, August 15, 2005, she underwent an MRI.

Claimant, who is four feet eleven inches tall and weighs 110 pounds, testified that the lifting she performed on August 8, 2005, included five-gallon pails of chili and ice and crates of lettuce that are approximately four feet long and two feet wide. She also testified she could think of no other activity, other than her lifting at work, that would have caused her low back symptoms.

No expert medical opinion was presented at the first preliminary hearing. And upon review to the Board, the Board was not persuaded as to the cause of claimant's injury. In its March 9, 2006, Order, the Board held, in pertinent part:

> The MRI findings suggest claimant's back problems likely preexisted the date of her alleged accident. Although there is no evidence that claimant's preexisting back condition was symptomatic, there is also no expert medical opinion relating claimant's present symptoms to her activities at work. Given that the most significant onset of claimant's symptoms occurred at home rather than at work, the Board considers such a medical causation opinion to be necessary in this case for claimant to sustain her burden of proof. In the absence of any medical expert relating claimant's episode at home on August 9, 2005, to her work activities the day before, the Board finds that claimant has failed to prove her injury arose out of and in the course of her employment with respondent.[1]

At the second preliminary hearing, which was held on May 18, 2006, claimant introduced an April 3, 2006, letter from Dr. Pat D. Do. The doctor stated he had reviewed

[1] *Garone v. Wendy's*, No. 1,025,067, 2006 WL 931103 (Kan. WCAB March 9, 2006).

claimant's medical records and concluded her back pain was a result of her August 8, 2005, work injury. The doctor noted claimant was lifting *10 gallons* of chili after which she experienced back pain.

After receiving Dr. Do's medical report, the Judge again determined it was more probably true than not claimant injured her back working for respondent. The Board agrees. Claimant, who is rather petite, began experiencing back symptoms shortly after lifting some heavy items at work. The next morning her back pain continued and her back locked. And now, claimant has presented a medical opinion that relates her present back symptoms to her lifting at work. In conclusion, the preliminary hearing Order should be affirmed.

Respondent and its insurance carrier argue that claimant is not entitled to receive temporary total disability benefits. The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue specifically designated in K.S.A. 44-534a as being subject to review from a preliminary hearing order. There is no question an administrative law judge has the jurisdiction at a preliminary hearing to determine if a worker's status qualifies the individual to receive temporary total disability benefits.[2]

As provided by the Workers Compensation Act, preliminary hearing findings are not final but, instead, those findings may be modified upon a full hearing of the claim.[3]

WHEREFORE, the Board affirms the May 19, 2006, preliminary hearing Order entered by Judge Klein.

IT IS SO ORDERED.

Dated this ____ day of July, 2006.

BOARD MEMBER

c: Gary K. Albin, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[2] K.S.A. 44-534a(a)(2) and K.S.A. 2005 Supp. 44-551(b)(2)(A).

[3] K.S.A. 44-534a.